

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial of the  
License of Barbara and Kevin  
Johnson to Provide Family Foster  
Care

**RECOMMENDED ORDER GRANTING  
THE DEPARTMENT'S MOTION  
FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing dated November 15, 2002. On December 19, 2002, the Department of Human Services filed a Motion for Summary Disposition. The Applicants did not submit a response in opposition to the motion. The record with respect to the motion closed on February 10, 2003, upon receipt of additional information requested by the Administrative Law Judge.

Vicki Vial-Taylor, Assistant County Attorney, 525 Portland Avenue South, 12<sup>th</sup> Floor, Minneapolis, Minnesota 55415, appeared on behalf of the Department of Human Services. The Applicants, Barbara and Kevin Johnson, 5238 Fremont Avenue North, Minneapolis, MN 55430, appeared on their own behalf, without counsel.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED that the Motion for Summary Disposition filed by the Department of Human Services be GRANTED.

Dated: February 25, 2003.

/s/ Barbara L. Neilson

---

BARBARA L. NEILSON  
Administrative Law Judge

**NOTICE**

This Order is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommended Order of the Administrative Law Judge. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Recommended Order has been made available to the parties to the proceeding for at least ten days and an opportunity has

been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact the Office of the Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155; telephone 651-296-2701, for further information regarding the filing of exceptions and the presentation of argument.

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Recommended Order will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the Recommended Order and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

## **MEMORANDUM**

In this contested case proceeding, Barbara and Kevin Johnson have appealed the decision by the Department of Human Services (“DHS” or “the Department”) to deny their application for a family foster care license. The Department has moved for summary disposition on the grounds that there are no material issues of fact in dispute and it is entitled to disposition of this case in its favor as a matter of law. Summary disposition is the administrative equivalent of summary judgment.<sup>[1]</sup> Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>[2]</sup> A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>[3]</sup>

The moving party must demonstrate that no genuine issues of material fact exist.<sup>[4]</sup> If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.<sup>[5]</sup> The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.<sup>[6]</sup> The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.<sup>[7]</sup> The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.<sup>[8]</sup>

## **Factual Background**

Based upon the materials submitted by the parties, it appears that the facts in this matter relevant to the Motion for Summary Disposition are as follows. The Applicants, Barbara and Kevin Johnson, originally applied to Hennepin County for a foster care license on May 8, 2000.<sup>[9]</sup> As part of the licensing process, a background

study was conducted with respect to all persons over the age of 13 who were living in the household. Based upon the results of the study, Mr. Johnson was found to be disqualified from direct contact with persons served by DHS-licensed programs.<sup>[10]</sup> Mr. Johnson requested reconsideration of the disqualification.

On September 15, 2000, Mr. Johnson was notified that the Department would not grant a variance or set aside his disqualification and was informed of his right to obtain judicial review of this final agency decision through a petition for a writ of certiorari.<sup>[11]</sup> There is no evidence that the Johnsons sought judicial review of the final DHS determination regarding the disqualification. On October 23, 2000, the Department denied the Johnsons' foster care license application because Mr. Johnson had a disqualification that had not been set aside.<sup>[12]</sup> The letter notified the Johnsons of their right to appeal the decision and proceed to a contested case hearing under Chapter 14 of the Minnesota Statutes.<sup>[13]</sup> The Johnsons did not appeal the October 23, 2000, Order of Denial.<sup>[14]</sup> As a result, no hearing was held before an Administrative Law Judge concerning the decision to deny the 2000 license application.

On September 30, 2002, the County received a second application for a foster care license from the Johnsons.<sup>[15]</sup> A background study conducted with respect to the application revealed that the Johnsons' previous application had been denied on October 23, 2000.<sup>[16]</sup> On October 1, 2002, the County recommended that DHS deny the second application based on Minn. Stat. §§ 245A.07, subd. 3, and 245A.08, subd. 5.<sup>[17]</sup> On October 18, 2002, the Department issued an Order of Denial with respect to the 2002 application because Mr. Johnson had been found to be disqualified, the disqualification had not been set aside, and the Johnsons' original foster care application had been denied less than two years before.<sup>[18]</sup> The Johnsons filed a timely appeal of the 2002 Order of Denial,<sup>[19]</sup> resulting in the initiation of the present contested case proceeding. In her November 6, 2002, letter filed in connection with the appeal, Ms. Johnson indicated that Mr. Johnson had completed individual counseling, an anger management class, and probation, and argued that it was in the best interests of the child at issue to remain in their home.<sup>[20]</sup>

The Department filed its motion for summary disposition on December 19, 2002. By letter dated January 9, 2003, the Administrative Law Judge explained the nature of a motion for summary disposition and gave the Johnsons an opportunity to send a response by January 17, 2003. The Judge indicated in the letter that, "[b]ecause the County and the Department provided affidavits in support of their summary disposition arguments, you must also provide affidavits in order to adequately contest the motion" and pointed out that, "[i]f you wish to rely upon facts that are within the personal knowledge of yourselves or other individuals, you must submit affidavits of those persons in addition to simply discussing those facts in your memorandum in opposition to the motion." The Johnsons did not submit any response to the motion.

By letter dated January 24, 2003, the Administrative Law Judge pointed out that more than two years have now passed since the denial of the original license application on October 23, 2000, and asked the Johnsons to inform her by February 3, 2003, if they wished to withdraw this appeal and submit a new application for licensure.

that would not be subject to the two-year bar set forth in the statute. In the alternative, the Administrative Law Judge requested that the parties send additional information by February 7, 2003, concerning the reasons for the denial of the original license application in 2000. The Johnsons did not notify the Administrative Law Judge that they wished to withdraw this appeal, nor did they submit any additional information concerning the reasons for the original license denial. The Department submitted additional materials by letter dated February 7, 2003. These materials were received on February 10, 2003.

The additional information submitted by the Department on February 10, 2003, shows that the Johnsons' original license application was denied in 2000 because Mr. Johnson was disqualified based upon a 1999 gross misdemeanor conviction for domestic assault, a 1998 misdemeanor conviction for domestic assault, and a 1998 child protection maltreatment finding.<sup>[21]</sup> The child protection determination/disqualification was later rescinded and, according to the Department, does not constitute a basis for the 2000 Order of Denial.<sup>[22]</sup> Mr. Johnson submitted requests for reconsideration with respect to the 1998 and 1999 convictions, and Ms. Johnson submitted a letter dated August 1, 2000, on behalf of her husband.<sup>[23]</sup> Mr. Johnson stated in his requests for reconsideration (both dated August 4, 2000) that he had not followed his Rule 25 assessment recommendations or sought help for his anger issues after the 1998 domestic assault conviction, but he had since "received education" for his anger issues through the East Side Program and was seeing a therapist at Pathways for individual counseling concerning his chemical dependency issues.<sup>[24]</sup> By letter dated August 16, 2000, Pathways Psychological Services notified the County Agency that Mr. Johnson's last visit was on June 15, 2000; he had not completed the court-ordered program that he had begun on September 30, 1999, by the date of the letter; and he had not responded to Pathways' attempts to reach him to complete his treatment and financial responsibilities.<sup>[25]</sup>

## **Parties' Arguments and Analysis**

In its motion for summary disposition, the Department argues that the Johnsons' application was properly denied because two years had not yet run from the date that their original application was denied. The Department points out that Minn. Stat. § 245A.08, subd. 5, requires that "[a]n applicant whose application was denied must not be granted a license for two years following a denial, unless the applicant's subsequent application contains new information, which constitutes a substantial change in the conditions that caused the previous denial." The Department asserts that the previous denial was based upon Mr. Johnson's disqualification from licensure and emphasizes that this disqualification was not challenged in court and had not been set aside. Because Mr. Johnson remains disqualified from licensure, the DHS maintains that there has been no substantial change in the conditions that caused the previous denial. Moreover, the Department emphasizes that the Johnsons have not received any verification from a third party or any other documentation that Mr. Johnson has successfully completed any programming regarding the domestic abuse issues that resulted in the 2000 disqualification. The Department thus asserts that there are no

genuine issues of material fact that have a bearing on the outcome of this case and the Department is entitled to judgment as a matter of law.

Minn. Stat. § 245A.08, subd. 5, states that an applicant whose application was denied must not be granted a license for two years following a denial unless there is new information in the later application that “constitutes a substantial change in the conditions that caused the previous denial.” It is undisputed that the Johnsons’ original application was denied on October 23, 2000, and that their second application was submitted on September 30, 2002, and denied on October 18, 2002, less than two years later. There is no evidence that Mr. Johnson’s disqualification has been set aside or overturned. The application does not contain new information that shows that there has been a substantial change in the conditions that caused the previous denial—that is, the disqualification based upon two domestic assault convictions--within the meaning of the statute, and the Johnsons have not provided any affidavits verifying the completion of chemical dependency or domestic abuse treatment despite being informed by the Administrative Law Judge that such affidavits would be necessary to adequately contest the Department’s motion for summary disposition. Because the dates of the 2000 Order of Denial and the 2002 application and Order of Denial are not in dispute and the Johnsons have not shown through affidavits that there has been a substantial change in the conditions that caused the previous denial, the Administrative Law Judge has concluded that there is no genuine issue of material fact remaining for hearing and the Department is entitled to prevail as a matter of law. Accordingly, it is recommended that the Department’s order denying the Johnsons’ 2002 application be affirmed, and no hearing be held.<sup>[26]</sup>

The Administrative Law Judge notes that two years have now expired since the denial of the 2000 application. Despite the issuance of this Recommended Order, the Johnsons would be free to submit an additional foster care application at this time, along with affidavits and other documentation showing the status of Mr. Johnson’s domestic abuse and chemical dependency treatment and any other materials that they contend will show that the license application should be granted.

B.L.N.

---

<sup>[1]</sup> Minn. R. 1400.5500 (K).

<sup>[2]</sup> *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03; Minn. R. 1400.5500 (K).

<sup>[3]</sup> *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W. 2d 804, 808 (Minn. App. 1984).

<sup>[4]</sup> *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

<sup>[5]</sup> *Highland Chateau*, 356 N.W.2d at 808; *Hunt v. IBM Mid America Employees*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>[6]</sup> *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

<sup>[7]</sup> *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

<sup>[8]</sup> See *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hospital*, 362 N.W.2d 386, 389 (Minn. App. 1985).

<sup>[9]</sup> Affidavit of Davis, Ex. 5.

<sup>[10]</sup> Affidavit of Davis, Ex. 2.

<sup>[11]</sup> Affidavit of Davis at 4.0 and Exs. 2 and 3.

<sup>[12]</sup> Affidavit of Davis at ¶ 3.0 and Ex. 2.

<sup>[13]</sup> Affidavit of Davis, Ex. 2.

<sup>[14]</sup> Affidavit of Davis at ¶ 3.0.

<sup>[15]</sup> Affidavit of Davis, Ex. 1.

<sup>[16]</sup> Affidavit of Davis at ¶ 3.0.

<sup>[17]</sup> Affidavit of Davis at 5.0 and Ex. 4.

<sup>[18]</sup> Affidavit of Davis at 6.0 and Ex. 5.

<sup>[19]</sup> Affidavit of Davis at 7.0 and Ex. 6.

<sup>[20]</sup> *Id.*

<sup>[21]</sup> Feb. 7, 2003, letter from Ms. Vial-Taylor to the Administrative Law Judge, Attachments A-F.

<sup>[22]</sup> Feb. 7, 2003, letter from Ms. Vial-Taylor to the Administrative Law Judge.

<sup>[23]</sup> *Id.*, Attachments G-I.

<sup>[24]</sup> *Id.*, Attachments G and H.

<sup>[25]</sup> *Id.*, Attachment J.

<sup>[26]</sup> It would not be proper to permit the present contested case hearing to focus on the propriety of the earlier disqualification or the 2000 application denial. Minn. Stat. § 245A.05 specifies that “[t]he applicant may appeal the denial [of a license application] by notifying the commissioner in writing by certified mail within 20 calendar days after receiving notice that the application was denied.” The statute thus does not provide for extensions or exceptions to the twenty-day appeal period. The Order of Denial issued in 2000 to the Johnsons clearly informed them of their right to appeal the decision within twenty calendar days after receipt of the notice, in conformity with the statute.<sup>[26]</sup> When the Johnsons failed to appeal the DHS’ 2000 Order of Denial, that order became final. No contested case proceeding was ever initiated with respect to that order. As a result, the Administrative Law Judge has no jurisdiction in connection with that order and is precluded from further reviewing the grounds for the earlier denial of the application. See, e.g., *In the Matter of the Claims Against Grain Buyer’s Bond No. BR-7712*, OAH Docket No. 69-0400-9025-2 (1994) (due to failure to file a timely appeal, the Department’s determination that a claim was ineligible became final; the lack of a properly filed appeal denies jurisdiction to the Department and the Administrative Law Judge); *In re Kindt*, 542 N.W.2d 391 (Minn. App. 1996) (benefit termination letter provided sufficient notice that the individual was not eligible for medical assistance benefits, and guardian’s failure to act within the statutory appeals period made the challenge of the discontinuation of benefits untimely); *Nieszner v. Minnesota Dept. of Jobs & Training*, 499 N.W.2d 832 (Minn. App. 1993) (failure of the employer to file a timely appeal from the initial determination that the employee was qualified to receive unemployment benefits made the initial determination final and precluded further review of the employee’s claim).